

Courtland L. Reichman, SBN 2668873
MCKOOL SMITH HENNIGAN, P.C.
255 Shoreline Drive, Suite 510
Redwood Shores, California 94065
Tel: (650) 394-1400; Fax: (650) 394-1422
reichman@mckoolsmith.com

Steven J. Pollinger (*pro hac vice*)
Craig N. Tolliver (*pro hac vice*)
Geoffrey L. Smith (*pro hac vice*)
Eric C. Green (*pro hac vice*)
Joel Stonedale (*pro hac vice*)
MCKOOL SMITH, P.C.
300 West 6th Street, Suite 1700
Austin, Texas 78701
Tel: (512) 692-8700; Fax: (512) 692-8744
spollinger@mckoolsmith.com; gsmith@mckoolsmith.com;
ctolliver@mckoolsmith.com; egreen@mckoolsmith.com;
jstonedale@mckoolsmith.com

Robert Muller, SBN 189651
Douglas P. Roy, SBN 241607
CYPRESS, LLP
11111 Santa Monica Blvd., Suite 500
Los Angeles, California 90025
Tel: (424) 901-0123; Fax: (424) 750-5100
bob@cypressllp.com; doug@cypressllp.com

Attorneys for Plaintiffs
Good Technology Corporation and
Good Technology Software, Inc.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

Good Technology Corporation and
Good Technology Software, Inc.,

) Case No. 5:12-cv-05826 PSG
)
) **GOOD TECHNOLOGY PLAINTIFFS'**
) **NOTICE OF MOTION AND MOTION**
) **TO EXCLUDE OPINIONS OF**
) **MOBILEIRON'S PROPOSED**
) **EXPERTS RICHARD EICHMANN,**
) **EARL SACERDOTI, STEPHEN GRAY**
) **AND PETER REIHER**
)
) Date: Tuesday, June 2, 2015
) Time: 10:00 AM
) Ctrm: Courtroom 5
) Judge: Honorable Paul S. Grewal

MobileIron Inc

Defendant

) Date: Tuesday, June 2, 2015
) Time: 10:00 AM
) Ctrm: Courtroom 5
) Judge: Honorable Paul S. Grewal

Case No. 5:12-cv-05826 PSG

Good's Mot. To Exclude Eichmann, Sacerdoti, Gray and Reiher Opinions

1 TO DEFENDANT MOBILEIRON, INC., AND ITS COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on June 2, 2015 at 10:00 AM or soon thereafter as it may be
 3 heard, in the courtroom of the Honorable Judge Paul S. Grewal, San Jose Courthouse, Courtroom 5 -
 4 4th Floor, 280 South 1st Street, San Jose, CA 95113, Good Technology Corporation and Good
 5 Technology Software, Inc., ("Good") will, and hereby does, move the Court for an order excluding
 6 opinions of MobileIron's proposed experts Richard Eichmann, Earl Sacerdoti, Stephen Gray and
 7 Peter Reiher regarding Good's lost profits for MobileIron's infringement of the four Good patents-
 8 in-suit, MobileIron's alleged royalty for its counterclaim patent, alleged non-infringing alternatives,
 9 purported prior art, and claimed reduction to practice, as unreliable, irrelevant and contrary to law
 10 and fact in violation of *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and Federal Rule
 11 of Evidence 702.

12 This motion is supported by the attached Memorandum of Points and Authorities, the
 13 accompanying Declaration of Joel Stonedale, the record in this matter, and any argument that the
 14 Court may accept at the hearing.

15 **RELIEF REQUESTED**

16 Good seeks an order excluding (1) the opinions of Richard Eichmann regarding a reasonable
 17 royalty for alleged infringement of MobileIron's counterclaim patent, (2) the opinions of Richard
 18 Eichmann regarding Good's lost profits to the extent such opinions relate to any consideration of
 19 sales *MobileIron* may have lost, (3) the opinions of Stephen Gray and Richard Eichmann concerning
 20 acceptability of alleged non-infringing substitutes referred to as "Alternative Multi-User
 21 Functionality On iOS" and "Multiple-Command Transmission," (4) the opinions of Earl Sacerdoti
 22 and Stephen Gray concerning theoretical prior art PDA Defense, SMS, AMO, and Altiris systems
 23 and (5) the opinions of Peter Reiher that the Lange reference is not prior art or concerning alleged
 24 reduction to practice of U.S. Patent No. 8,359,016 ("the '016 patent") claims, as unreliable,
 25 irrelevant and contrary to law and fact, in violation of *Daubert* and Federal Rule of Evidence 702.

1 DATED: May 1, 2015

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MC KOO L SMITH HENNIGAN, P.C.
255 Shoreline Drive, Suite 510
Redwood Shores, CA 94065

DATED: May 1, 2015

MC KOO L SMITH HENNIGAN, P.C.
255 Shoreline Drive, Suite 510
Redwood Shores, CA 94065

By: /s/ Craig N. Tolliver

Attorney for Plaintiffs
Good Technology Corporation and
Good Technology Software, Inc.

Case No. 5:12-cv-05826 PSG

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McKool Smith Hennigan, P.C.
255 Shoreline Drive, Suite 510
Redwood Shores, CA 94065

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McKool Smith Hennigan, P.C.
255 Shoreline Drive, Suite 510
Redwood Shores, CA 94065

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

MobileIron's proposed experts offer a range of methodologically flawed opinions that fail multiple threshold requirements and should be excluded as unreliable, contrary to law, unsupported by the facts, and tending to confuse the issues and mislead the jury.

MobileIron's damages consultant, Richard Eichmann, contravenes the entire market value rule, fails to apportion to account for unpatented features as required, bases his opinions on incorrect, hypothetical pricing while ignoring actual pricing, and inexplicably allocates all profits to MobileIron. He thereby arrives at a "reasonable" royalty that amounts to [REDACTED] of Good's *revenues* from certain product licenses, despite the fact those licenses include components that do not infringe MobileIron's single counterclaim patent.

Mr. Eichmann offers additional unfounded opinions regarding Good’s claim for lost profits on its four patents-in-suit. He relies on a backwards methodology based on what proportion of accused sales he supposes *MobileIron* would have “lost” if it did not infringe Good’s patents (as opposed to Good’s lost sales), in an effort to avoid more than 90% of Good’s lost profits.

One of MobileIron's technical consultants, Stephen Gray, blindly adopts the unfounded lay opinion of a MobileIron employee regarding hypothetical non-infringing substitutes that never existed, without offering any analysis establishing that such hypothetical products would have been acceptable to MobileIron's customers. Mr. Eichmann in turn relies on, and expands upon, Mr. Gray's unsupported conclusions, compounding Mr. Gray's errors, in a further effort to reduce Good's damages.

Mr. Gray and Dr. Earl Sacerdoti, another of MobileIron’s technical consultants, attempt to fabricate prior art “systems,” never shown to exist, from collections of documents from multiple sources and spanning several years. They improperly seek to treat these fictional systems and their collections of documents as single prior art references, to escape their burden of establishing reasons

1 to combine their multitude of disparate references and to avoid evidence of objective indicia
 2 showing nonobviousness.

3 Peter Reiher, a technical consultant for MobileIron's patent, attempted to eliminate prior art
 4 by arguing MobileIron's patent was reduced to practice in a product released ten months before the
 5 patent application was filed. But he later admitted that he has failed to show that the product
 6 embodied the patent claims, and thus it cannot constitute reduction to practice.

7 MobileIron's consultants' erroneous, legally-impermissible theories are not based on
 8 scientific, technical, or other specialized knowledge. They are unsupported by sufficient facts or
 9 data, and are not the product of reliable principles and methods being appropriately applied to the
 10 facts of the case. They will not help the jury to understand the evidence or to determine a fact in
 11 issue, and instead risk confusing the issues and misleading the jury. Accordingly, all of these
 12 opinions should be excluded.

13 II. LEGAL STANDARDS

14 Courts act as gatekeepers to exclude expert testimony that does not meet the relevance and
 15 reliability threshold requirements. In this role, Courts determine the admissibility of expert testimony
 16 based on Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579
 17 (1993). The reliability of expert opinion testimony is assessed by considering whether it is “based
 18 on sufficient facts or data” and “the product of reliable principles and methods” that have been
 19 “reliably applied … to the facts of the case.” FED. R. EVID. 702. Courts should exclude testimony if
 20 “there is simply too great an analytical gap between the data and opinion proffered.” *Gen. Elec. Co.*
 21 *v. Joiner*, 522 U.S. 136, 146 (1997) (holding that the trial court may strike “opinion evidence that is
 22 connected to existing data only by the *ipse dixit* of the expert”). Analysis that does not comport with
 23 applicable law likewise should be excluded under Rule 702. *Apple, Inc. v. Samsung Elecs. Co.*,
 24 2012 U.S. Dist. LEXIS 90877, *27-28 (N.D. Cal. June 29, 2012) (excluding expert testimony on
 25 damages because the expert’s analysis was “contrary to law”). MobileIron bears the burden of
 26 establishing the admissibility of its proposed experts’ testimony. See *Daubert*, 509 U.S. at 592 n.10.

1 **III. MR. EICHMANN'S OPINION THAT A ROYALTY OF [REDACTED] OR MORE WOULD
2 BE REASONABLE FOR MOBILEIRON'S COUNTERCLAIM PATENT
3 CONTRAVENES THE ENTIRE MARKET VALUE RULE, IS THE RESULT OF
4 FALSE ASSUMPTIONS AND IMPERMISSIBLE METHODOLOGIES, AND
5 SHOULD BE EXCLUDED AS SUCH**

6 MobileIron's proposed damages expert Richard Eichmann misapplies the law, fails to
7 apportion as required, relies on hypothetical pricing while ignoring actual pricing, and relies on
8 impermissible and unsound methodologies, building error upon error to arrive at a "reasonable"
9 royalty that amounts to [REDACTED] of Good's *revenues* from certain products licenses, despite the fact
10 those licenses include components that do not infringe MobileIron's single counterclaim patent. The
11 Federal Circuit has emphasized that any "damages theory must be based on sound economic and
12 factual predicates." *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 67 (Fed. Cir.
13 2012). Mr. Eichmann's theories are based on neither, and instead rely on misapplication of the law
14 and fictional sales prices. MobileIron should not be permitted to improperly influence the jury with
15 such methodologically, legally and factually flawed opinions. *Apple v. Samsung*, 2012 U.S. Dist.
LEXIS 90877, at *27-28 (excluding expert testimony on damages because the expert's analysis was
"contrary to law").

16 **A. Mr. Eichmann's Methodology Of Basing A Royalty On Total Revenues He
17 Associates With Accused Products Contravenes The Entire Market Value Rule**

18 While Mr. Eichmann indicates that he did not intend to apply the entire market value rule
19 ("EMVR"),¹ he in fact uses precisely the methodology the EMVR proscribes, basing his proposed
20 reasonable royalty on *revenues* for accused products, and applying the same royalty to license
21 bundles that include both the accused products and non-infringing components.² Mr. Eichmann's
22 methodology, regardless of how labeled, is contrary to law, and his opinions regarding a reasonable
23 royalty for MobileIron's counterclaim patent should therefore be excluded.

24

25 ¹ Ex. A (1/9/2015 Eichmann Rpt.) ¶66 [REDACTED]

26 [REDACTED]. Unless otherwise indicated, all lettered exhibits herein refer to the exhibits to the
27 accompanying declaration of Joel Stonedale.

28 ² As explained in section III.C. *infra*, Mr. Eichmann separately errs by using fictional sales prices that are
much higher than actual sales prices reflected in data Mr. Eichmann chose to ignore.

1 For purposes of a reasonable royalty analysis,³ “[a] patentee may assess damages based on
 2 the entire market value of the accused product *only where* the patented feature creates the basis for
 3 customer demand or substantially creates the value of the component parts.” *VirnetX, Inc. v. Cisco*
 4 *Sys.*, 767 F.3d 1308, 1326 (Fed. Cir. 2014) (quoting *Versata Software, Inc. v. SAP Am., Inc.*, 717
 5 F.3d 1255, 1268 (Fed. Cir. 2013)). In the absence of such a showing, principles of apportionment
 6 apply. *Id.* Further the “obligation to apportion damages only to the patented features does not end
 7 with the identification of the smallest salable unit if that unit still contains significant unpatented
 8 features.” *VirnetX*, 767 F.3d at 1329.

9 Contrary to Mr. Eichmann’s assurance that he is “not applying the entire market value rule
 10 here”⁴, he in fact bases his proposed royalty on *revenues*, i.e., the entire market value, for accused
 11 AppCentral products⁵ and opines that MobileIron is entitled to *all* of Good’s presumed profits, which
 12 he speculates to be [REDACTED] of *all revenues* for the accused products.⁶ Mr. Eichmann’s methodology of
 13 basing a royalty on the entire value of accused products, without any attempt to show that “the
 14 patented feature creates the basis for customer demand or substantially creates the value of the
 15 component parts,” is directly contrary to the EMVR. *See VirnetX*, 767 F.3d at 1326. Regardless of
 16 whether Mr. Eichmann recognizes it or not, and “[w]hether called ... ‘apportionment’ or anything
 17 else, the fact remains that the royalty was expressly calculated as a percentage of the entire market
 18 value of a [multi-component product] rather than a patent-practicing [component] alone. This, by
 19 definition, is an application of the entire market value rule.” *VirnetX*, 767 F.3d at 1329 (quoting
 20 *LaserDynamics*, 694 F.3d at 68).

21 Mr. Eichmann’s misapplication of the EMVR raises “the fundamental concern about skewing
 22 the damages horizon—of using a [royalty] base that misleadingly suggests an inappropriate range”
 23 of damages. *VirnetX*, 767 F.3d at 1327. Accordingly, Mr. Eichmann’s opinions regarding a
 24

25 ³ Mr. Eichmann’s report does not include any opinions regarding lost profits with respect to MobileIron’s
 26 ’016 patent, and this portion of Good’s brief accordingly concerns a reasonable royalty analysis.

27 ⁴ Ex. A (1/9/2015 Eichmann Rpt.) at ¶66.

28 ⁵ MobileIron’s infringement expert, Dr. Reiher, provides an opinion that AppCentral infringes but does not
 provide any infringement opinion regarding any other Good product.

29 ⁶ Ex. A (1/9/2015 Eichmann Rpt.) at ¶¶7, 74-76.

1 reasonable royalty for MobileIron's counterclaim patent should be excluded. *Id.* at 1328-29
 2 (agreeing that expert testimony "on the proper royalty base should have been excluded because it
 3 relied on the entire market value of [accused] products without demonstrating that the patented
 4 features drove the demand for those products.").

5 **B. Mr. Eichmann's Methodology Of Failing To Apportion To Account For
 6 Unpatented Features Is Contrary To Law**

7 Mr. Eichmann claims that instead of applying the EMVR, he [REDACTED]

8 [REDACTED]⁷ But he fails to provide any analysis of the economic contribution of technology *not*
 9 claimed in the patent, and assumes without explanation that MobileIron is entitled to all of Good's
 10 profits (which he speculates to be [REDACTED] of revenues) for accused AppCentral products.⁸

11 "No matter what the form of the royalty, a patentee must take care to seek only those
 12 damages attributable to the infringing features." *VirnetX*, 767 F.3d at 1326. The "law requires
 13 patentees to apportion the royalty down to a reasonable estimate of the value of its claimed
 14 technology, or else establish that its patented technology drove demand for the entire product." *Id.* at
 15 1329; *see also LaserDynamics*, 694 F.3d at 67-68 (Fed. Cir. 2012); *Ericsson, Inc. v. D-Link Sys.*, 773
 16 F.3d 1201, 1226 (Fed. Cir. 2014) ("The essential requirement is that the ultimate reasonable royalty
 17 award must be based on the incremental value that the patented invention adds to the end product.");
 18 *Open Text S.A. v. Box, Inc.*, 2015 U.S. Dist. LEXIS 8783, at *24-25 (N.D. Cal. Jan. 23, 2015). Mr.
 19 Eichmann, however, has failed to "even attempt to subtract any other unpatented elements from the
 20 base, which therefore included various features indisputably not claimed by" MobileIron. *VirnetX*,
 21 767 F.3d at 1328.

22 Mr. Eichmann instead offers the unsupported conclusion that Good's supposed profit of [REDACTED]
 23 per unit per month [REDACTED].⁹ He arbitrarily picks [REDACTED] per
 24 unit per month as the price of AppCentral (which is much higher than actual selling prices of
 25 [REDACTED]

26 ⁷ Ex. A (1/9/2015 Eichmann Rpt.) at ¶66.

27 ⁸ *Id.* at ¶¶7, 74-76.

28 ⁹ Ex. A (1/9/2015 Eichmann Rpt.) at ¶76.

1 AppCentral plus non-infringing components, as detailed in section III.C. *infra*), and then arbitrarily
 2 applied an [REDACTED] profit margin to arrive at a royalty of [REDACTED] per unit per month, without any
 3 apportionment for the unclaimed aspects of the products to which he applies the royalty.¹⁰

4 Like any other expert opinion, to survive *Daubert* an apportionment analysis must be based
 5 on reliable scientific methodology. *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 463 (9th
 6 Cir. 2014). A damages expert cannot “pluck[] [his apportionment] out of thin air based on vague
 7 qualitative notions....” *LaserDynamics*, 694 F.3d at 69. The expert must include “economic
 8 analysis to quantitatively support [his] apportionment,” or otherwise face exclusion for the same
 9 arbitrariness as “the ‘25% Rule.’” *Id.* Mr. Eichmann’s arbitrary equating of a reasonable royalty
 10 with a hypothetical [REDACTED] profit margin on a hypothetical (and erroneous, as explained *infra*) \$5
 11 selling price, is not based on any “scientific methodology.” Mr. Eichmann—an economist, not a
 12 technical expert—did not undertake any analysis to determine what features not covered by the
 13 patents-in-suit may be part of the accused products. Nor did he rely on any opinions on this topic
 14 from MobileIron’s technical expert, as there were no such opinions. “[N]othing in either *Daubert* or
 15 the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to
 16 existing data only by the *ipse dixit* of the expert.” *General Elec. Co.*, 522 U.S. at 146.

17 Having erroneously arrived at a [REDACTED] unapportioned royalty for AppCentral, Mr. Eichmann
 18 then attempts to bootstrap this same arbitrary, unapportioned royalty into his analysis of licenses to a
 19 different product, Good Dynamics.¹¹ Mr. Eichmann acknowledges that [REDACTED]
 20 [REDACTED]

21 [REDACTED]¹² Further, it is undisputed that Good Dynamics is a multi-purpose
 22 product that has multiple components and includes at least the following capabilities, which
 23 MobileIron does not even claim are covered by its patent: “Authenticate and manage users;
 24 communicate between a client on a mobile device and an application server that is behind the

25
 26
¹⁰ *Id.* at ¶¶74-76.

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¹¹ Ex A. (1/9/2015 Eichmann Rpt.) at ¶¶88-89.

28
¹² *Id.* at ¶66.

1 enterprise firewall; Protect data in transit with secure communications; Protect data at rest with
 2 secure storage; [and] Enforce security measure such as password policies.”¹³

3 Yet Mr. Eichmann inexplicably fails to address the value of the non-claimed features of
 4 AppCentral or of Good’s “other security-related products” (Good Dynamics) included in bundles, or
 5 attempt to apportion value between them. Mr. Eichmann fails, again, to “even attempt to subtract
 6 any other unpatented elements from the base, which therefore included various features indisputably
 7 not claimed by” MobileIron. *VirnetX*, 767 F.3d at 1328. The result is an *unreasonable* proposed
 8 royalty rate, amounting to [REDACTED] of the [REDACTED] average selling price and entire market value of a
 9 bundle that includes licenses to Good Dynamics and AppCentral, without any legal or factual
 10 justification for such unreasonable, economically irrational terms.

11 The error of Mr. Eichmann’s methodology is further demonstrated by the fact that Good has
 12 sold a version of Good Dynamics without a license to AppCentral for [REDACTED] per user per month,
 13 while the average selling price of Good Dynamics with a license to AppCentral was only [REDACTED]

14 [REDACTED]¹⁴ While pretending to apportion based on the supposed “economic contribution of the
 15 claimed technology,” Mr. Eichmann simply ignores that the *actual* economic contribution of
 16 AppCentral, reflected in the real-world selling prices, is a small fraction of what Mr. Eichmann
 17 prefers.

18 Accordingly, Mr. Eichmann’s opinions regarding MobileIron’s claimed royalty should be
 19 excluded. *See, e.g., VirnetX*, 767 F.3d at 1329 (concluding expert testimony should be excluded
 20 where the expert “failed to apportion value between the patented features and the vast number of
 21 non-patented features contained in the accused products....”); *GPNE Corp. v. Apple, Inc.*, No. 12-
 22 CV-02885-LHK, 2014 U.S. Dist. LEXIS 53234, at *20-21 (N.D. Cal. Apr. 16, 2014) (excluding
 23 reasonable royalty opinion when expert failed to distinguish infringing features from non-infringing
 24 features and “apportion value between them”).

25
 26
 27¹³ Ex. B (1/9/15 Smith Rpt.) at ¶¶67-68.
 28¹⁴ Ex. X (2/13/2015 Weinstein Rebuttal Rpt.) at ¶145.

1 **C. Mr. Eichmann's Opinions Are Impermissibly Based On Incorrect Facts And**
 2 **Data, Ignoring Actual Sales Prices In Favor Of Fictional Prices To Yield A**
 3 **[REDACTED] Royalty Rate On Revenues That Include Non-Infringing Components**

4 Mr. Eichmann's opinions regarding a royalty should be rejected on the separate ground that
 5 they are improperly based on his erroneous presumptions as to what he supposes "Good would have
 6 charged" for accused products, rather than actual sales data Good provided.¹⁵ The result is a [REDACTED]
 7 or higher royalty, *exceeding* the revenues for and the entire market value of the accused AppCentral
 8 product itself, as well as a product bundle that includes a license to the accused AppCentral product
 9 *plus* a license to the non-infringing Good Dynamics product.¹⁶ As noted above, Mr. Eichmann never
 10 attempts to account for the unpatented features—such as those in Good Dynamics—that are included
 11 in the product licenses to which he applies his royalty.

12 Expert testimony must be based upon sufficient facts or data and the expert must reliably
 13 apply the principles and methods to the facts of the case. Fed. R. Evid. 702; *see LaserDynamics*,
 14 694 F.3d at 67 (observing that any "damages theory must be based on sound economic and factual
 15 predicates."). Mr. Eichmann's opinions fail both requirements.

16 Rather than relying on actual sales data Good provided, Mr. Eichmann undertakes an
 17 analysis of hypothetical [REDACTED]

18 [REDACTED]¹⁷ Mr. Eichmann notes that Good "considered" or "suggested" various pricing models as
 19 low as [REDACTED] per user per month,¹⁸ then concludes that [REDACTED]

20 [REDACTED]¹⁹ " [REDACTED]
 21 [REDACTED]
 22 [REDACTED]²⁰ To reach his result, he selectively ignores portions of the same
 23 documents he relies upon. He "observe[s]" [REDACTED]

24 _____
 25 ¹⁵ Ex. A (1/9/2015 Eichmann Rpt.) at ¶¶7, 74-76, 85.

26 ¹⁶ *Id.*

27 ¹⁷ Ex. A (1/9/2015 Eichmann Rpt.) at ¶74.

28 ¹⁸ *Id.*

¹⁹ *Id.* at ¶85.

²⁰ *Id.* at ¶76.

1 [REDACTED]” in a March 2013 presentation,²¹ but fails to mention that the same
 2 document indicates an average selling price (in contrast to list price) of [REDACTED] for standalone
 3 AppCentral.²²

4 More fundamentally, in basing his proposed royalty on a hypothetical selling price of [REDACTED] Mr.
 5 Eichmann supposes “Good would have charged” for the accused products had they been sold
 6 separately, Mr. Eichmann improperly ignores *actual* sales prices, failing to address the fact that
 7 AppCentral products were sold for an average selling price (“ASP”) of [REDACTED] per user per month.²³
 8 Mr. Eichmann’s arbitrary choice of a [REDACTED]/user/month list price for AppCentral is also irreconcilable
 9 with the [REDACTED] per user per month ASP of a bundle that includes AppCentral in addition to the *non-*
 10 *infringing* Good Dynamics product. Mr. Eichmann’s proposed [REDACTED] royalty is approximately [REDACTED] of
 11 the entire market value of this bundle of accused AppCentral and non-accused Good Dynamics.²⁴
 12 The flaw in Mr. Eichmann’s methodology is even more striking when one considers the undisputed
 13 fact that Good Dynamics is a multi-purpose product that has multiple components and capabilities
 14 noted in the preceding section that MobileIron does not even claim to be covered by its patent.

15 Mr. Eichmann’s reliance upon hypothetical sales prices while ignoring actual sales prices
 16 renders his opinions unreliable and irrelevant. The Court should exercise its gatekeeping role to
 17 exclude Mr. Eichmann’s unfounded royalty opinions.

18 **D. Mr. Eichmann’s Methodology Of Allocating All Profits To MobileIron Is
 19 Contrary To Law**

20 Mr. Eichmann’s errors lie not only in his failure to apportion based on respective economic
 21 contributions of the claimed technology and unclaimed features as explained above. Mr. Eichmann
 22 also erroneously allocates to MobileIron 100% of the [REDACTED] in profits he incorrectly presumes Good
 23

24²¹ *Id.* at ¶74c.

25²² Ex. X (2/13/2015 Weinstein Rebuttal Rpt.) at ¶¶171, 174; Ex. L (GOODND00923723).

26²³ *Id.* at ¶¶54, 112, 121, 142. Mr. Eichmann also ignores the fact that approximately [REDACTED] of the accused
 27 standalone AppCentral products were given to existing Good customers free of charge. *Id.* Based on the
 actual ASP of [REDACTED] for products that were not provided free of charge, Mr. Eichmann’s proposed [REDACTED] royalty
 is approximately [REDACTED] of the entire market value of accused AppCentral products. *Id.*

²⁴ *Id.* at ¶172.

would earn, leaving nothing for Good.²⁵ He offers the *ipse dixit* conclusion that “I believe [this] would indicate a reasonable royalty in this case.”²⁶ But he fails to reconcile his conclusion with the *Georgia-Pacific* framework, and cannot explain why it would be reasonable for Good or any other business entity involved in a hypothetical negotiation to agree to terms where it would earn nothing or suffer a loss on each sale.

Mr. Eichmann’s arbitrary assignment of 100% of profits to MobileIron should be excluded because it is not based on any reliable scientific methodology. *Estate of Barabin*, 740 F.3d at 463 (9th Cir. 2014). He erroneously “pluck[s] [his apportionment] out of thin air” and fails to offer any “economic analysis to quantitatively support [his] apportionment.” *LaserDynamics*, 694 F.3d at 69. Mr. Eichmann’s unprincipled approach of awarding MobileIron 100% of profits without explanation should be rejected for the same reasons the Federal Circuit has rejected “rules of thumb” calling for much lower but similarly unreasoned allocations of 50% and 25% of profits to a patentee.²⁷ As the Federal Circuit has explained, an expert’s apportioning of profits must be tied to the facts of the case. But Mr. Eichmann fails to explain why all profits should be allocated to MobileIron in the hypothetical negotiation. And “nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.” *General Elec. Co.*, 522 U.S. at 146. Mr. Eichmann’s allocation of all profits to MobileIron is arbitrary and irrational, falling far short of the requirements set forth in Rule 702 and *Daubert*, and should be excluded.

²⁵ Ex. A (1/9/2015 Eichmann Rpt.) at ¶76.

²⁶ *Id.* at ¶76 [REDACTED]

²⁷ See *VirnetX*, 767 F.3d at 1332 (“[W]e agree with the courts that have rejected invocations of the Nash theorem without sufficiently establishing that the premises of the theorem actually apply to the facts of the case at hand. The use here was just such an inappropriate ‘rule of thumb.’ ... Anyone seeking to invoke the theorem as applicable to a particular situation must establish that fit, because the 50/50 profit-split result is proven by the theorem only on those premises.”); *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1317 (Fed. Cir. 2011) (“The 25 percent rule of thumb as an abstract and largely theoretical construct fails to satisfy this fundamental requirement. The rule does not say anything about a particular hypothetical negotiation or reasonable royalty involving any particular technology, industry, or party. Relying on the 25 percent rule of thumb in a reasonable royalty calculation is far more unreliable and irrelevant than reliance on parties’ unrelated licenses, which we rejected in *ResQNet* and *Lucent Technologies*.”).

1 **IV. MR. EICHMANN'S OPINIONS REGARDING GOOD'S LOST PROFITS—BASED
2 ON HIS BACKWARDS METHODOLOGY OF INQUIRING INTO SALES
3 MOBILEIRON MAY HAVE “LOST” IF IT DID NOT INFRINGE GOOD’S
4 PATENTS—SHOULD BE EXCLUDED AS UNRELIABLE, IRRELEVANT AND
5 CONTRARY TO LAW**

6 The errors in Mr. Eichmann’s opinions regarding a reasonable royalty for MobileIron’s
7 counterclaim patent are discussed above. Mr. Eichmann also offers unreliable and irrelevant
8 opinions regarding Good’s lost profits for MobileIron’s infringement of Good’s four patents-in-suit.
9 While Mr. Eichmann failed to apportion when it would have reduced MobileIron’s claimed royalty
10 as explained *supra*, here Mr. Eichmann seeks to apply a legally impermissible theory under the guise
11 of “apportioning” to eliminate more than 90% of Good’s lost profits. He opines, without citing any
12 support, that in calculating lost profits, “[o]ne might consider … (1) [h]ow many of accused sales
13 would *MobileIron* have lost had they been unable to utilize the Good patents-in-suit? [a]nd, (2)
14 [h]ow many of those sales would Good have acquired?”²⁸ But the issue here is *Good’s* lost profits.

15 There is no reason, let alone precedent, for “one [to] consider … how many of accused sales
16 would MobileIron have lost” if it did *not* infringe Good’s patents. The lost profits inquiry concerns
17 Good’s lost profits, not MobileIron’s. It is assumed for purposes of damages assessments that the
18 “accused sales” *do* infringe valid patents. Indeed, Mr. Eichmann explicitly assumes infringement in
19 his damages analysis.²⁹ The appropriate analysis under applicable law addresses the situation where
20 *no* infringing sales would have been made by MobileIron, and thus, in Mr. Eichmann’s words,
21 MobileIron would have “lost” all accused sales. Mr. Eichmann’s theory that MobileIron would not
22 have “lost” [REDACTED] of its infringing sales makes no sense, is contrary to law and Mr. Eichmann’s own
23 assumptions, and is irrelevant. Mr. Eichmann’s theory should be excluded for the additional reason
24 that it is particularly likely, if not designed, to mislead the jury.

25
26
27 ²⁸ Dkt. 236-8 (2/13/2015 Eichmann Rpt.) at ¶71.
28 ²⁹ Ex. C (2/13/2015 Eichmann Rpt.) at ¶12.

1 **V. MR. GRAY'S METHODOLOGY OF BLINDLY ADOPTING THE UNFOUNDED
2 LAY OPINION OF A MOBILEIRON EMPLOYEE REGARDING ALLEGED NON-
3 INFRINGEMENT SUBSTITUTES, AND MR. EICHMANN'S UNFOUNDED RELIANCE
4 ON MR. GRAY'S OPINIONS, ARE UNRELIABLE, AND THEIR OPINIONS
5 SHOULD BE EXCLUDED AS SUCH**

6 Mr. Eichmann challenges Good's lost profits, in part, based on his assertion that there were
7 non-infringing alternatives to the accused products.³⁰ But none of Mr. Eichmann's supposed non-
8 infringing alternatives actually existed. The "alternatives" Mr. Eichmann offers are pure speculation
9 of how MobileIron *might* have been able to modify its accused products to "design around" Good's
10 patents. Despite facing an injunction, MobileIron never developed and offered such redesigned
11 products and instead continued offering the infringing products. None of Mr. Eichmann's
12 theoretical products were available to purchasers of MobileIron's infringing products while Good
13 has been losing sales and profits as a result of MobileIron's infringement.

14 A basic requirement for any non-infringing alternative is that it must be shown to be
15 "acceptable" to customers, including technically and economically acceptable, as an alternative to
16 the accused products. "Mere existence of a competing device does not make that device an
17 acceptable substitute." *TWM Mfg. Co. v. Dura Corp.*, 789 F.2d 895, 901 (Fed. Cir. 1986). "'A
18 product lacking the advantages of that patented can hardly be termed a substitute 'acceptable' to the
19 customer who wants those advantages.'" *Id.* (quoting *Panduit Corp. v. Stahlin Bros. Fibre Works,*
20 *Inc.*, 575 F.2d 1152, 1162 (6th Cir. 1978)).

21 To reach his conclusions regarding purported non-infringing alternatives, Mr. Eichmann
22 relies on the unfounded opinions of Mr. Gray, a technical consultant. For U.S. Patent No. 6,151,606

23 ("the '606 patent"), Mr. Gray describes a hypothetical alternative he calls [REDACTED]

24 [REDACTED]"³¹ For U.S. Patent No. 8,012,219 ("the '219 patent"), he describes a
25 hypothetical alternative he refers to as [REDACTED]³² Mr. Gray opines that
26 these two hypothetical designs would have been "*technically*" acceptable and feasible, but offers no
27 independent analysis and admits that his opinion is based on the unsupported conclusions of a

28

³⁰ Dkt. 236-8 (2/13/2015 Eichmann Rpt.) at ¶¶37-38.

³¹ Dkt. 255-40 (2/13/2015 Gray Rpt.) ¶¶327-329.

³² *Id.* at ¶¶334-337.

1 MobileIron employee, Suresh Batchu. Regarding the first hypothetical design, Mr. Gray states that

2 [REDACTED]

3 [REDACTED] ³³ Regarding the

4 second hypothetical design, Mr. Gray states, nearly identically, that [REDACTED]

5 [REDACTED]

6 [REDACTED] ³⁴

7 Mr. Gray failed to undertake any independent analysis to determine whether or not
 8 MobileIron's hypothetical alternatives, had they existed, would have been acceptable to
 9 MobileIron's customers, "technically," economically or otherwise.³⁵ Instead, Mr. Gray relies on
 10 unspecified conversations with MobileIron's non-expert employee for his assumptions that
 11 MobileIron's hypothetical design-around would have been only "*technically* acceptable" and
 12 "feasible."³⁶ But Mr. Gray could not even explain anything Mr. Batchu did to arrive at his
 13 conclusion.³⁷ And neither Mr. Gray nor the lay-witness MobileIron employee offer customer studies
 14 or surveys or anything else to support their self-serving, conclusory statements. Mr. Gray elected
 15 not to ask MobileIron's employee what the basis was for his opinion and chose to blindly adopt a
 16 biased lay witness's unsupported statements as his own expert opinion, rendering his opinion
 17 unreliable.³⁸

18 "Important factual points should not be proven through experts spoon-fed by wholly biased
 19 sources." *Geo. M. Martin Co. v. Alliance Mach. Sys. Int'l, LLC*, No. C 07-00692 WHA, 2008 WL
 20 2008638, at *1 (N.D. Cal. May 6, 2008). Under Rules 702 and 403, an expert cannot merely "bless"

21

22

23 ³³ *Id.* at ¶329.

24 ³⁴ *Id.* at ¶337.

25 ³⁵ Ex. D (3/19/2015 Gray Dep. Tr.) at 131:9-18, 132:24-133:9 (regarding multi-user functionality); 143:23-
 144:2 (regarding multiple command transmission).

26 ³⁶ Dkt. 255-40 (2/13/2015 Gray Rpt.) ¶329 (regarding multi-user functionality), ¶337 (regarding multiple
 27 command transmission).

³⁷ Ex. D (3/19/2015 Gray Dep. Tr.) at 131:19-132:3 (regarding multi-user functionality), 144:6-9 (regarding
 28 multiple command transmission).

³⁸ Nor did Good have any opportunity to depose Mr. Batchu regarding his lay opinions on non-infringing
 alternatives. His opinion was not revealed until after the close of fact discovery in Mr. Gray's expert report.

1 a client's assertions.³⁹ “[N]o professional should reasonably rely on such a rigged and biased source
 2 of information for any materially important fact to his or her opinion . . . [U]nder Rule 403, the
 3 ‘probative value’ of such testimony is far outweighed by risk of ‘misleading the jury,’ such that
 4 references and opinion dependent thereon should be excluded.” *Therasense*, 2008 U.S. Dist. LEXIS
 5 124780, at *16. This is especially true where, as here, the fact relied upon is the sole basis for the
 6 expert’s opinion. “The more central the ‘fact’ issue is in the overall opinion and overall trial and the
 7 more controverted the ‘fact’ is in the context of the case, the more due diligence an expert should
 8 exercise before merely taking a partisan’s word.” *Id.* at *18. Mr. Gray’s conclusory, unfounded
 9 statements regarding noninfringing alternatives fail the requirements of Rules 702 and 403 and
 10 *Daubert*, and should be excluded.

11 Further, Mr. Gray’s methodological errors infected the opinions of MobileIron’s damages
 12 consultant, Mr. Eichmann, who relies on Mr. Gray’s unfounded opinion without undertaking
 13 independent analysis. As an additional ground for exclusion, while Mr. Gray’s opinions were
 14 limited to “technical” acceptability and feasibility, Mr. Eichmann states more broadly that “[b]ased
 15 on” some unspecified [REDACTED]

16 [REDACTED].⁴⁰ But Mr. Eichmann offers no support for opining
 17 that MobileIron’s hypothetical alternatives, had they existed, would have been “acceptable” to
 18 MobileIron’s customers in all respects, including economically. Mr. Eichmann notes time and cost
 19 estimates from Mr. Gray, but fails to explain why or offer any evidence that MobileIron’s never-
 20 implemented designs in fact would be acceptable to MobileIron’s customers.⁴¹ Mr. Eichmann
 21 merely adopts Mr. Gray’s unfounded opinions relying on unsupported lay witness opinions of a

22 ³⁹ *Therasense, Inc. v. Becton, Dickinson & Co.*, No. C 04-02123 WHA, 2008 U.S. Dist. LEXIS 124780, at
 23 *16 (N.D. Cal. May 22, 2008); *Ask Chems., LP v. Computer Packages, Inc.*, No. 14-3041, 2014 U.S. App.
 24 LEXIS 23444, at *10 (6th Cir. Dec. 10, 2014); *King-Indiana Forge, Inc. v. Millennium Forge, Inc.*, No. 1:07-
 25 cv-00341-SEB-DML, 2009 U.S. Dist. LEXIS 96131, at *4 (S.D. Ind. Sept. 29, 2009) (“When an expert’s
 proffered opinion merely parrots information provided to him by a party, that opinion is generally
 excluded.”).

26 ⁴⁰ Dkt. 236-8 (2/13/2015 Eichmann Rpt.) ¶38 [REDACTED]

Ex. C ¶48 [REDACTED]

27 [REDACTED]).

28 ⁴¹ Dkt. 236-8 (2/13/2015 Eichmann Rpt.) ¶¶37-38.

1 biased MobileIron employee regarding “technical” acceptability and feasibility, perpetuating the
 2 infirmities described above with respect to Mr. Gray’s testimony. Mr. Eichmann’s conclusory,
 3 unfounded opinions should be excluded under Rules 702 and 403 and *Daubert*.

4 **VI. MR. GRAY’S AND DR. SACERDOTI’S OPINIONS REGARDING FABRICATED
 5 PRIOR ART “SYSTEMS” NEVER SHOWN TO EXIST SHOULD BE PRECLUDED
 AS UNRELIABLE AND UNFOUNDED**

6 Unable to proffer any actual products or systems that existed in the prior art, MobileIron’s
 7 experts assemble dozens of miscellaneous documents and present groups of these *documents* as
 8 though they are physical “systems” that anticipate or render obvious certain claims of the patents-in-
 9 suit. But MobileIron’s experts fail to establish that the alleged “systems”—which MobileIron refers
 10 to as Altiris, PDA Defense, SMS and AMO—*ever existed*, let alone existed during the relevant time
 11 before the priority dates of Good’s patents.

12 It is understandable that MobileIron’s experts would want to cast multiple documents as a
 13 single “system” to avoid the rigors of performing an obviousness analysis for all of the individual
 14 documents, but the Federal Circuit has rejected such gamesmanship. The Federal Circuit “requires
 15 that in order to anticipate a claim, a *single* prior art reference must expressly or inherently disclose
 16 each claim limitation.” *Kyocera Wireless Corp. v. ITC*, 545 F.3d 1340, 1351 (Fed. Cir. 2008)
 17 (internal quotation omitted) (emphasis added). In *Kyocera*, the Court rejected arguments that a
 18 collection of documents referred to as the “GSM standard” “function as a single, coherent reference”
 19 and therefore should be treated as a single reference that could anticipate asserted claims. *Id.* at
 20 1351-52. The court noted that the documents were written by different authors at different times,
 21 and concluded that each document, “though part of the greater GSM standard, stands as a separate
 22 document in its own right.” *Id.* at 1351. The court accordingly determined that “the GSM standard is
 23 actually several prior art references with separate dates of creation, rather than a single prior art
 24 reference” and “is not available for use as a single anticipating reference under § 102.” *Id.* at 1351-
 25 52. The same is true here. The documents MobileIron’s experts offer for each of the four fictional
 26 systems are separate documents in their own right, with separate dates of creation, regardless of
 27 whether they describe similar technology, and cannot be used as a single anticipating reference

1 under § 102. *Id.* Nor are the fictional systems, purportedly described by the documents, available as
 2 a single anticipating reference—it has not been established that they ever existed, let alone existed at
 3 the relevant time. MobileIron's experts fail to identify any such “systems” that were ever created
 4 prior to the patent priority dates and that implemented the teachings from the multitude of references
 5 MobileIron's experts seek to improperly combine.

6 If MobileIron believed its theoretical “systems” existed at the relevant times, it should have
 7 pursued discovery from third parties and offered credible evidence of their existence. Having failed
 8 to do so, MobileIron cannot now end-run the single-reference rule simply by having its experts
 9 decree that multiple [REDACTED]

10 [REDACTED].”⁴² While MobileIron may argue that its groups of documents
 11 should be combined in an obviousness analysis, those documents cannot be treated as a single
 12 reference that anticipates or, when combined with other references, renders obvious any asserted
 13 patent claims. *Kyocera*, 545 F.3d at 1351-52. Mr. Gray’s and Dr. Sacerdoti’s methodologies of
 14 concocting four “systems” from collections of disparate documents are contrary to law and divorced
 15 from the facts, and their opinions regarding these fabricated “systems” should be excluded. *Id.*

16 A. **Dr. Sacerdoti’s Invalidity Opinions Based On The Fabricated “Altiris” System
 17 Should Be Precluded As Unreliable And Unfounded**

18 Dr. Sacerdoti alleges that an “Altiris Handheld Management Suite” (“Altiris”) system, which
 19 he describes as “a collection of related products,” is prior art that anticipates or renders obvious
 20 certain claims of U.S. Patent No. 7,970,386 (“the ’386 patent”), but fails to show that any such
 21 system ever existed, let alone existed before the priority date of the ’386 patent, and his collection of
 22 documents is not a “system” that can be treated as a single prior art reference.⁴³

23 1. **Documents Dr. Sacerdoti Relies Upon Fail To Establish That The
 24 Theoretical Altiris System Ever Existed**

25 Dr. Sacerdoti’s invalidity opinion depends on a combination of six documents, including
 26 technical literature, marketing materials, and release notes.⁴⁴ Dr. Sacerdoti asserts that the [REDACTED]

27 ⁴² See, e.g., Dkt 186-7 (1/9/2015 Sacerdoti Rpt.), App. C at 1, App. D at 2, App. E at 2, App. G at 1.

28 ⁴³ Ex. E (1/9/2015 Sacerdoti Rpt.) at 69-72; Dkt. 186-7 (1/9/2015 Sacerdoti Rpt.), App. E at 1-2.

29 ⁴⁴ Dkt. 186-7 (1/9/2015 Sacerdoti Rpt.), App. E at 1.

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED].⁴⁵ But the references have not been shown to be “prior art” or to describe any
 4 single prior art system at all. They indicate copyright dates from 2004 to 2005, indicating that
 5 revisions were made throughout that period, contrary to Dr. Sacerdoti’s unfounded claim that these
 6 documents all describe “the same prior art system.”⁴⁶ Also belying Dr. Sacerdoti’s claim, the
 7 references appear to cover different versions of an Altiris design or product,⁴⁷ and Dr. Sacerdoti does
 8 not even argue that the features and functionalities of any such Altiris designs were unchanging over
 9 time. Even if Dr. Sacerdoti had established that one or more products having some of the features
 10 described in the references existed at some time, this would not support his opinion that a *single*
 11 product existed before the June 3, 2005 priority date and embodied *all* the features and functionality
 12 described in each of the references. Thus, there is no basis for Dr. Sacerdoti treating the multiple
 13 references, or the fictional system he claims they describe, as a single prior art reference. If Dr.
 14 Sacerdoti wished to use more than one of the references for his invalidity theories, he should have
 15 offered a sound reason for combining them.

16 Dr. Sacerdoti’s analysis is premised on all the documents he cites describing a single prior art
 17 system, which has not been shown to ever exist, let alone exist at the relevant time. His opinions
 18 regarding the fabricated Altiris system therefore should be excluded as unreliable and contrary to the
 19 facts and the law.

20 **2. MobileIron’s “Re-Created” Test System Does Not Establish That Any
 21 Altiris System Previously Existed**

22 MobileIron, unable to proffer any “Altiris system” that existed in 2004 (before the priority
 23 date of the ’386 patent), hired a consultant, Alan Purdy, to attempt to create one for litigation ten

24 ⁴⁵ *Id.* at App. E at 2.

25 ⁴⁶ See, e.g., Ex. M (DEFINV0009670 (Altiris Inventory Solution 6.1 for Pocket PC Product Guide)) and Ex.
 26 N (DEFINV0009668 (Altiris Handheld Management Suite Datasheet, indicating 2005 copyright)); Ex. O
 (DEFINV0009623 (Release Notes Altiris Pocket PC Agent 6.1 Service Pack 1, indicating 2004 copyright)).

27 ⁴⁷ Compare, e.g., Ex. O (DEFINV0009623 (Release Notes Altiris Pocket PC Agent 6.1 Service Pack 1))
 28 with Ex. M (DEFINV0009670 (Altiris Inventory Solution 6.1 for Pocket PC Product Guide)) and Ex. N
 (DEFINV0009668 (Altiris Handheld Management Suite Datasheet)).

1 years later, from an assembly of hardware and software components of unknown provenance.⁴⁸ Dr.
 2 Sacerdoti, in opining that claims of the '386 patent are invalid, blindly relies on [REDACTED]
 3 [REDACTED]
 4 [REDACTED]"⁴⁹ But Dr. Sacerdoti has no
 5 foundation for concluding that such a system even existed during the relevant time. Neither Dr.
 6 Sacerdoti nor Mr. Purdy offer any evidence that such a system actually existed in 2004, long before
 7 Mr. Purdy created one in 2014 at MobileIron's behest for this litigation. There is no indication that
 8 Mr. Purdy took any steps to establish the provenance of the individual software and hardware
 9 components he assembled, let alone establish that they were combined in the identical manner in
 10 2004. Dr. Sacerdoti's analysis is premised on the system being assembled from "prior art
 11 machines," but he provides no evidence for his supposition that the particular "machines" existed at
 12 all, let alone in the same state in 2004. Both the hardware and the software Mr. Purdy assembled
 13 have not been shown to exist in 2004, and even if they did then exist in some form, could have been
 14 reconfigured or otherwise modified at any point during the ten years before Mr. Purdy conducted his
 15 tests.

16 Dr. Sacerdoti either failed to consider these issues or consciously elected not to do anything
 17 to investigate them, yet still relied upon Mr. Purdy's claim charts and screenshots.⁵⁰ Either way,
 18 whether by negligence or willful blindness, Dr. Sacerdoti's failure to provide any foundation that
 19 this newly-assembled system actually existed a decade ago renders his opinions unreliable. It is his
 20 obligation to set forth the basis of any opinions he plans to rely upon, and here he fails to meet the
 21 most basic of requirements—showing that alleged prior art in fact ever existed prior to the invention.
 22 Dr. Sacerdoti failed to take even basic steps to investigate Mr. Purdy's system. In fact, Dr. Sacerdoti
 23 testified he did not know when or where Mr. Purdy's system was set up and that he was not provided
 24

25 ⁴⁸ Ex. E (1/9/2015 Sacerdoti Rpt.) at 5.

26 ⁴⁹ *Id.*

27 ⁵⁰ *Id.* (stating that Dr. Sacerdoti [REDACTED])

1 an opportunity to even inspect Mr. Purdy's test system.⁵¹ And while Dr. Sacerdoti admitted that [REDACTED]

2 [REDACTED]
3 [REDACTED] " and "so on and so forth,"⁵² he and Mr. Purdy [REDACTED]⁵³

4 Dr. Sacerdoti admits that [REDACTED]

5 [REDACTED] but disclaims any knowledge of how Mr.
6 Purdy configured the test system beyond the incomplete information shown in the claim chart.⁵⁴

7 Despite the lack of foundation, Dr. Sacerdoti relied entirely on Mr. Purdy and [REDACTED]

8 [REDACTED].⁵⁵
9 Like MobileIron's expert, Good has also been kept in the dark concerning Mr. Purdy's
10 system. Good was never informed of Mr. Purdy's creation until Dr. Sacerdoti relied upon it in his
11 report. And Good was not afforded an opportunity to inspect the system or to depose Mr. Purdy.
12 Nor has MobileIron provided any details about the system's configuration.

13 Dr. Sacerdoti's opinions, based on the experiments of someone he claims "re-created" a
14 complex prior art system, but who is not testifying in this case and whose configuration of a system
15 conjured a decade after the relevant time was not investigated let alone verified by Dr. Sacerdoti, are
16 unreliable and should be excluded.

17 **B. Mr. Gray's Invalidity Opinions Based On The Fabricated "PDA Defense"**
18 **System Should Be Precluded As Unreliable And Unfounded**

19 Mr. Gray alleges that a so-called "PDA Defense" system, from a company known as
20 Asynchrony Solutions, is prior art that anticipates or renders obvious certain claims of the '219
21 patent.⁵⁶ Mr. Gray's invalidity analysis relies on a collection of materials, including a book, product
22 documentation, marketing materials, webpages, and even a handbook about the Palm V Organizer
23 that has no relation to PDA Defense.⁵⁷ Like Dr. Sacerdoti, Mr. Gray claims that these references

24 ⁵¹ Ex. F (3/18/2015 Sacerdoti Dep. Tr.) at 225:24-226:7.

25 ⁵² *Id.* at 226:11-18.

26 ⁵³ *Id.* at 227:22-228:6.

27 ⁵⁴ *Id.* at 228:7-24.

⁵⁵ *Id.* at 229:2-9.

⁵⁶ Ex. G (1/9/2015 Gray Rpt.) ¶106.

⁵⁷ *Id.* at ¶106.

1 [REDACTED] ⁵⁸ But Mr.
 2 Gray's circular statement is contradicted by the references themselves. They indicate different
 3 versions of PDA Defense operating on different operating systems with different features on
 4 different devices.⁵⁹ Several of the references include copyright dates ranging from 2000 to 2003,⁶⁰
 5 indicating that revisions were made throughout that period. And David Melnick, a former
 6 Asynchrony employee, testified that the features of PDA Defense varied over time and depending on
 7 which type of PDA was being used.⁶¹

8 Even if Mr. Gray had established that one or more products having some of the features
 9 described in the references existed at some time, this would not support his opinion that a *single*
 10 product existed before the August 9, 2002 priority date (or even before the August 9, 2003 priority
 11 date Mr. Gray argues should apply) and embodied *all* the features and functionality described in
 12 each of the references.⁶² Thus, there is no basis for Mr. Gray treating the multiple references, or the
 13 fictional system he claims they describe, as a single prior art reference. If Mr. Gray wished to use
 14
 15

16 ⁵⁸ *Id.* at ¶107.

17 ⁵⁹ See, e.g., Ex. H (DEFINV0008547 (PDA Security)) at 8741 ("One additional fail-safe feature in PDA
 18 Defense Enterprise version 3.1 works only for BlackBerry RIM devices."); Ex. I (AS000003 (PDA Defense
 19 RIM Installation Flow Chart indicating 2002 copyright)); Ex. J (AS000017-61 (PDA Defense Enterprise
 Version 3.1b.03.07.24 Administrator Guide indicating 2000-2003 copyright and describing Palm OS, Pocket
 PC and RIM devices)); Ex. K (AS000093-99 (PDA Defense Enterprise Version 3.1b.03.07.24 Upgrade
 Instructions indicating 2000-2003 copyright)).

20 ⁶⁰ See, e.g., Ex. J (AS000017-61 (PDA Defense Enterprise Version 3.1b.03.07.24 Administrator Guide
 21 indicating 2000-2003 copyright and describing Palm OS, Pocket PC and RIM devices)); Ex. K (AS000093-99
 (PDA Defense Enterprise Version 3.1b.03.07.24 Upgrade Instructions indicating 2000-2003 copyright)).

22 ⁶¹ Ex. P (10/24/2014 Melnick Depo. Tr.) at 110:8-111:20 (former PDA Defense employee testifying that
 23 "the PDA Defense product ... incorporated a number of new features and capabilities and had evolved" over
 time and "[c]ertainly we added feature and functionality based on client requirements over time to the
 platform" and "there were a lot of sort of specific little features and functionality elements that were enhanced
 over time.").

24 ⁶² Moreover, Mr. Gray fails to show that references he relies upon actually existed or described any system
 25 that existed before the '219 patent's priority date. He relies upon two website pages—which he calls "Bomb
 26 Enterprise" and "PDA Bomb"—and indicates they are "from June 2, 2001 as viewed through" a website
 (web.archive.org), but fails to establish they in fact are "from" or were published as of June 2, 2001 or any
 other time before the priority date. Ex. G (1/9/2015 Gray Rpt.) ¶106. MobileIron has objected to Good's use
 27 of such materials from the same website, arguing that they are hearsay, not sufficiently authenticated and
 untimely disclosed. Dkt. No. 264 (MobileIron's Objection To Reply Evidence). Similar objections would
 apply to the webpages Mr. Gray offers, and MobileIron should not be permitted to rely on such evidence here
 while arguing Good cannot rely on precisely the same type of evidence from the same source.

1 more than one of the references for his invalidity theories, he should have provided a sound reason
 2 for combining them.

3 Mr. Gray's analysis is premised on all the documents he cites describing a single prior art
 4 system, which has not been shown to ever exist, let alone exist at the relevant time. Mr. Gray's
 5 opinions regarding the fabricated PDA Defense system therefore should be excluded as unreliable
 6 and contrary to the facts and law.

7 **C. Dr. Sacerdoti's Invalidity Opinions Based On The Fabricated "SMS" System
 8 Should Be Precluded As Unreliable And Unfounded**

9 Dr. Sacerdoti alleges that a Microsoft "Systems Management Server 2003 including the
 10 Device Management Feature Pack" ("SMS") system is prior art that anticipates or renders obvious
 11 certain claims of the '386 patent⁶³ and U. S. Patent No. 7,702,322 ("the '322 patent").⁶⁴ Dr.
 12 Sacerdoti's invalidity theories rely on a combination of multiple documents, including technical
 13 literature and marketing materials.⁶⁵ Dr. Sacerdoti seeks to treat these multiple documents as a
 14 single prior art reference, arguing that these [REDACTED]

15 [REDACTED]
 16 [REDACTED] ⁶⁶ But his premise that the
 17 documents "identify ... the same prior art system" is undone by the references themselves, which
 18 indicate copyright and publication dates spanning several years.⁶⁷ Dr. Sacerdoti has failed to make
 19 any showing that the features and functionalities of any SMS-related product remained unchanged
 20 over time, that his supporting documentation all describes a *single* SMS product, or that such a
 21 product actually existed before the priority date and embodied *all* the features and functionality
 22 described in each of the references.

23
 24 ⁶³ Ex. E (1/9/2015 Sacerdoti Rpt.) at 48-53.

25 ⁶⁴ *Id.* at 105-10.

26 ⁶⁵ Ex. E (1/9/2015 Sacerdoti Rpt.) at 48-53, 105-10; Dkt. 186-7 (1/9/2015 Sacerdoti Rpt.), Appendix C at 1,
 27 Appendix G at 1.

28 ⁶⁶ Dkt. 186-7 (1/9/2015 Sacerdoti Rpt.), Appendix C at 1, Appendix G at 1.

29 ⁶⁷ See, e.g., Ex. Q (DEFINV0000001 (Microsoft Systems Management Server (SMS) 2003 Device
 30 Management Feature Pack Guide indicating "Published: October 2004")); Ex. R (DEFINV0004634
 31 (Operations Guide, Microsoft Systems Management Server 2003, indicating 1994-2003 copyright)).

1 Accordingly, there is no basis for Dr. Sacerdoti treating the multiple references, or the
 2 fictional system he claims they describe, as a single prior art reference. If Dr. Sacerdoti wished to
 3 use more than one of the references for his invalidity theories, he should have provided a sound
 4 reason for combining them.

5 Dr. Sacerdoti's analysis is premised on all the documents he cites describing a single prior art
 6 system, which has not been shown to ever exist, let alone exist at the relevant time. Dr. Sacerdoti's
 7 opinions regarding the fabricated SMS system therefore should be excluded as unreliable and
 8 contrary to the facts and law.

9 **D. Dr. Sacerdoti's Invalidity Opinions Based On The Fabricated "AMO" System
 10 Should Be Precluded As Unreliable And Unfounded**

11 Dr. Sacerdoti argues that a "Unicenter TNG Asset Management Option" ("AMO") system
 12 from Computer Associates International is prior art that anticipates or renders obvious certain claims
 13 of the '386 patent.⁶⁸ Dr. Sacerdoti's invalidity opinion relies on a combination of thirteen
 14 documents, including technical literature, marketing materials, and custom computer code scripts.⁶⁹
 15 Dr. Sacerdoti seeks to treat these multiple documents as a single prior art reference, arguing that
 16 these [REDACTED]
 17 [REDACTED]
 18 [REDACTED].⁷⁰

19 But the references do not describe any single prior art system at all. They include copyright
 20 and publication dates ranging from 1998 to 2005, indicating that revisions were made throughout
 21 that period, contrary to Dr. Sacerdoti's assertion that these documents all describe "the same prior art
 22 system."⁷¹ And Dr. Sacerdoti has failed to make any showing that the custom computer scripts he
 23

24 ⁶⁸ Ex. E 1/9/2015 Sacerdoti Rpt. at 60-63.

25 ⁶⁹ Dkt. 186-7 1/9/2015 Sacerdoti Rpt., Appendix D at 1.

26 ⁷⁰ *Id.* at Appendix D at 2.

27 ⁷¹ See, e.g., Ex. S CAI_0000001-24 (Unicenter Desktop and Server Management, Release Impact Guide r11,
 28 indicating 2005 copyright), at 5 (describing "new and enhanced features" in r11 release); Ex. T CAI_0000025-300 (Unicenter Desktop and Server Management, Implementation Guide r11, indicating 2005
 copyright), at 5 (describing "new and enhanced features" in r11 release); Ex. U CAI_0001008 (AMO 3.0
 Basic Admin Console and Engine User's Guide, indicating "Guide Revision 01 August 1998").

1 cites were ever implemented in any “AMO system.” Nor has he established that the features and
 2 functionalities of the purported AMO system remained unchanged over time, that his supporting
 3 documentation all describes a *single* product and that such a product existed before the priority date
 4 and embodied *all* the features and functionality described in each of the references. To the contrary,
 5 documents dated 2005 indicate that they reflect “new” features.⁷²

6 Accordingly, there is no basis for Dr. Sacerdoti treating the multiple references, or the
 7 fictional system he claims they describe, as a single prior art reference. If Dr. Sacerdoti wished to
 8 use more than one of the references for his invalidity theories, he should have provided a sound
 9 reason for combining them.

10 Dr. Sacerdoti’s analysis is premised on all the documents he cites describing a single prior art
 11 system, which has not been shown to ever exist, let alone exist at the relevant time. Dr. Sacerdoti’s
 12 opinions regarding the fabricated AMO system therefore should be excluded as unreliable and
 13 contrary to the facts and law.

14 **VII. DR. REIHER’S OPINION THAT THE LANGE REFERENCE IS NOT PRIOR ART
 15 TO MOBILEIRON’S ’016 PATENT SHOULD BE EXCLUDED AS UNRELIABLE
 16 AND UNFOUNDED**

17 Dr. Reiher argued in his report that the Lange reference⁷³ is not prior art because
 18 MobileIron’s ’016 patent was reduced to practice in the form of a “MobileIron version 2.0” product
 19 that was released before the Lange reference was published.⁷⁴ In a subsequent deposition, however,
 20 he admitted that he failed to analyze this product to show that it embodied each limitation of each
 asserted claim, and thus there is no reasoned basis for his conclusion.

21 “[T]here cannot be a reduction to practice of the invention ... without a physical embodiment
 22 which includes all limitations of the claim.” *UMC Electronics Co. v. United States*, 816 F.2d 647,
 23 652 (Fed. Cir. 1987), cert. denied, 484 U.S. 1025 (1988); *see Honeywell International Inc. v.*
 24

25 ⁷² Ex. S (CAI_0000001-24 (Unicenter Desktop and Server Management, Release Impact Guide r11,
 26 indicating 2005 copyright)), at 5 (describing “new and enhanced features” in r11 release); Ex. T
 (CAI_0000025-300 (Unicenter Desktop and Server Management, Implementation Guide r11, indicating 2005
 copyright)), at 5 (describing “new and enhanced features” in r11 release).

27 ⁷³ “Lange” refers to U.S. Patent Application Publication No. 2012/0072312, filed on September 22, 2010.

28 ⁷⁴ Dkt. 261-6 (2/13/2015 Reiher Rpt.) at ¶132.

1 *Universal Avionics Systems Corp.*, 488 F.3d 982, 997 (Fed. Cir. 2007) (“An invention is reduced to
 2 practice when the patentee has an embodiment that meets every limitation and operates for its
 3 intended purpose.”).

4 The few conclusory paragraphs Dr. Reiher points to in his report⁷⁵ fail to mention all the
 5 limitations of the ’016 patent claims, let alone establish that they were present in the “MobileIron
 6 version 2.0” product.⁷⁶ And Dr. Reiher admitted in his deposition that [REDACTED]

7 [REDACTED].⁷⁷ He
 8 admitted that he failed to address several claim limitations, including limitations regarding mobile
 9 device profiles,⁷⁸ filtering,⁷⁹ application management interfaces,⁸⁰ user directory stores,⁸¹ application
 10 identification⁸² and user profiles.⁸³

11 Dr. Reiher’s opinion that “the inventors of the ’016 patent had reduced the invention to
 12 practice” is not founded on any reliable comparison of the ’016 patent claim limitations to the
 13 MobileIron version 2.0 product. Accordingly, Dr. Reiher’s opinions that MobileIron version 2.0
 14 practices the ’016 patent and that the Lange reference or any other reference⁸⁴ is not prior art should
 15 be excluded as unfounded and unreliable.

16
 17
 18 ⁷⁵ Dkt. 261-6 (2/13/2015 Reiher Rpt.) at ¶132 [REDACTED]

“).

19 ⁷⁶ Ex. W (2/13/2015 Reiher Rpt.) at ¶¶48-51.

20 ⁷⁷ Ex. V (3/9/2015 Reiher Depo. Tr.) at 175:1-3.

21 ⁷⁸ *Id.* at 175:14-21 [REDACTED]

22 ⁷⁹ *Id.* at 175:22-176:5.

23 ⁸⁰ *Id.* at 176:6-17.

24 ⁸¹ *Id.* at 176:18-22 [REDACTED]

25 ⁸² *Id.* at 176:23-177:2 (“[REDACTED]”).

26 ⁸³ *Id.* at 177:3-7 [REDACTED]

27 ⁸⁴ Dr. Reiher appears to contend only that Lange is not prior art in view of the alleged reduction to practice
 28 in MobileIron version 2.0. However, for the reasons explained herein, he should not be permitted to contend
 that any reference is excluded as prior art on the basis of his unsupported suggestion that the patent claims
 were reduced to practice in MobileIron version 2.0.

VIII. CONCLUSION

For the foregoing reasons, Good respectfully requests that the Court exclude (1) the opinions of Richard Eichmann regarding a reasonable royalty for alleged infringement of MobileIron's counterclaim patent, (2) the opinions of Richard Eichmann regarding Good's lost profits to the extent such opinions relate to any consideration of sales *MobileIron* may have lost, (3) the opinions of Stephen Gray and Richard Eichmann concerning acceptability of alleged non-infringing substitutes referred to as "Alternative Multi-User Functionality On iOS" and "Multiple-Command Transmission," (4) the opinions of Earl Sacerdoti and Stephen Gray concerning purported prior art PDA Defense, SMS, AMO, and Altiris systems and (5) the opinions of Peter Reiher that the Lange reference is not prior art or concerning the reduction to practice of the '016 patent claims.

DATED: May 1, 2015

McKOOL SMITH HENNIGAN, P.C.

By: /s/ Craig N. Tolliver

Attorney for Plaintiffs
Good Technology Corporation and
Good Technology Software, Inc.

CERTIFICATE OF SERVICE

On May 1, 2015, the foregoing document was served via email upon counsel of record for MobileIron:

I. NEEL CHATTERJEE
nchatterjee@orrick.com
VICKIE L. FEEMAN
vfeeman@orrick.com
LILLIAN J. MAO
lmao@orrick.com
ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
Menlo Park, California 94025

By: /s/ Craig N. Tolliver
Craig N. Tolliver

McKool Smith Hennigan, P.C.
255 Shoreline Drive, Suite 510
Redwood Shores, CA 94065